Brandt Construction Co. *and* International Union of Operating Engineers, Local Union 150. Cases 33–CA–12420, 33–CA–12686, and 33–CA–12942

October 1, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On January 12, 2000, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

We affirm, inter alia, the judge's conclusion that the Respondent did not unlawfully refuse to hire or refuse to consider for hire certain named union-affiliated applicants. The judge issued his decision before the Board issued its decision in *FES*, 331 NLRB 9 (2000). In *FES*, the Board held that, to establish a discriminatory refusal to hire under the allocation of burdens set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must first show that (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. Once this is established, under *FES* the burden is shifted to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id. at 12.

We find that the judge's analysis in this pre-*FES* case is consistent with the above framework for analysis. The record shows that the Respondent was hiring during the time material herein, and there is no contention that the union-affiliated applicants lacked experience or training relevant to positions for which the Respondent was hiring.[3] In regard to antiunion animus, the judge found that the Respondent violated Section 8(a)(1) of the Act by changing its hiring *practices* to restrict the receipt of employment applications from prounion applicants. The Respondent does not except to that finding. The judge found, and we agree, that this unfair labor practice finding demonstrates the Respondent's antiunion animus.

The judge found, however, and again we agree, that the Respondent has shown that it would not have hired the prounion applicants even in the absence of their union activity or affiliation. More specifically, the record shows that the Respondent's established hiring policy was to give hiring preference to applicants who were current employees (i.e., presumably on layoff or some other form of absence from their employment with the Respondent at the time of their application for employment); past employees with proven safety, attendance, and work records; and applicants recommended by current supervisors or current employees. There is no contention that any of the prounion applicants in question were in any of the identified applicant-priority categories. The record shows that the Respondent hired 55 employees during the relevant period. Of those, 54 were referred for employment by incumbent supervisors or employees, or by Equal Employment Opportunity service providers pursuant to a conciliation agreement entered into between the Respondent and the U.S. Department of Labor in March 1997. The other applicant hired during this period was prounion employee

[1] The judge dismissed the 8(a)(1) allegation that the Respondent maintained its hiring policy "with the purpose or intended effect" of making it more difficult for union-affiliated applicants to be considered for employment. In his conclusions of law, however, the judge also stated that the Respondent's hiring policy was "not inherently discriminatory." We note that there is no contention by the General Counsel that the Respondent's hiring policy was inherently destructive of Sec. 7 rights.

The judge also found that the General Counsel established a prima facie case that the Respondent violated Sec. 8(a)(1) and (3) in refusing to consider for hire and refusing to hire certain named union-affiliated applicants. In so doing, the judge relied on the 8(a)(1) violations found herein as well as certain buttressing evidence that the Respondent told employees that the Union was trying to "salt the work force." Member Hurtgen notes that there is no finding that the "buttressing evidence" establishes a violation under Sec. 8(a)(1). He does not rely on this evidence to support a finding of animus. And, even if the established 8(a)(1) violations support animus and support a prima facie case, the Respondent has rebutted that case.

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge found all of the 55 job openings filled by the Respondent during the 1997–1998 period material herein were for relatively lower-paying laborer, truckdriver, or flagger positions, and he also found that only 34 of the 60 prounion job applicants in question were higher paid skilled equipment operators. However, he further found that an abundant pool of lower paid *referral* applicants existed for the laborer vacancies. See discussion, infra.

Angela Smith, who allegedly had earlier been unlawfully denied an opportunity to apply for employment with the Respondent, but who was subsequently hired after attending a flagger course sponsored by the Respondent. Accordingly, we find that the Respondent has satisfied its burden under *FES* by showing that it would not have hired the prounion applicants even in the absence of their union activity or affiliation.

We respectfully disagree with our colleague's conclusion that there was an unlawful refusal to consider applicants. In this regard, she relies on the finding that the photo identification requirement was unlawful. She says that, but for this requirement, the applicants would have been considered. However, this is contrary to the evidence. The evidence shows that these applicants were not considered because they did not meet the lawful criteria described above. In this respect, Terence Brandt, the Respondent's corporate secretary and the person responsible for day-to-day hiring, testified that the Respondent did not look for photographic identification from those who were walk-ins, i.e., those who did not meet the lawful criteria. He explained that the walk-ins never made it "to any other cut . . . . They got deleted immediately." Further, even if the photo requirement were a threshold requirement, the result would be the same. For even in the absence of that unlawful requirement, applicants would have been excluded from consideration because of failure to meet the lawful criteria described above. Accordingly, we find that the Respondent did not violate the Act when it failed to consider for hire the applicants.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brandt Construction Co., Milan, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER LIEBMAN, concurring in part and dissenting in part.

I agree with my colleagues and with the judge that the Respondent did not unlawfully refuse to hire the prounion applicants for employment here. However, contrary to my colleagues and the judge, I would find that the Respondent did unlawfully refuse to *consider* for employment those employees who were precluded from applying on April 21, 1997, because they did not have photo identification.

To establish a discriminatory refusal to consider for hire under Section 8(a)(3) and (1) of the Act, the General Counsel must show (1) that the employer excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden shifts to the employer to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *FES*, 331 NLRB 9 (2000).

I would find that the General Counsel has met his initial burden under *FES*, by showing that the Respondent excluded certain of the April 21 jobseekers from its hiring process, based on antiunion animus. This finding follows directly from the judge's unchallenged finding that the Respondent violated Section 8(a)(1) by imposing the new photo identification requirement to make it more difficult for prounion employees to apply for employment. The judge further found that several of the April 21 jobseekers were precluded from filing applications that day because they did not have photo identification with them.[1] In sum, certain employees were excluded from the hiring process as the direct result of the Respondent's antiunion animus.

Thus, the burden shifted to the Respondent to show that it would not have considered these employees even in the absence of their union activity or affiliation. I would find that the Respondent has not met its burden. The record establishes that it was antiunion animus alone that led to the photo identification requirement. The Respondent made no effort to show that the requirement was imposed for any lawful reason. It was only the failure to meet the requirement, in turn, that prevented the jobseekers from applying and from being considered for employment.

The judge found, and my colleagues and I agree, that none of the prounion employees would have been hired by the Respondent. This finding, however, does not compel the conclusion that the Respondent had a lawful reason for refusing to consider the employees that it precluded from applying. The approach taken by the judge, and endorsed by my colleagues, incorrectly collapses the distinction between refusal-to-consider violations and refusal-to-hire violations. An unlawful refusal to consider employees for employment and an unlawful refusal to hire them are different, although related, violations. Both the decision whether to consider an applicant and the separate decision whether to hire the applicant must be made on a nondiscriminatory basis.

[1] My colleagues assert that the photo identification requirement was *not* the reason that these applicants were not considered. This assertion, however, is contradicted by the judge's finding that "[s]everal . . . individuals were precluded from filing an application as they did not have a photo ID in their possession on that day." There was no exception to that finding. My colleagues further contend that "even in the absence of th[e] unlawful requirement," the applicants still would have been excluded from consideration based on other, lawful criteria. As I understand the evidence, consideration of the applicants might well have been perfunctory, but they would have been considered. It was the unlawful photo identification requirement that precluded even this minimal step.

Had the Respondent here permitted the April 21 jobseekers without photo identification to apply for employment, and had it considered them, it would have been entitled to follow its lawful system of hiring preferences and to decline to hire the jobseekers on that basis. But a lawful system of hiring preferences does not justify a refusal to consider certain jobseekers at all. Indeed, they must be considered in order for the hiring preferences to be applied. There is a difference, in other words, between a set of preferences for hiring and a set of requirements for applying. That an applicant would be at the bottom of the hiring list does not mean that the applicant would not be considered in the first place. Rather, he would be considered and then rejected.

Because a refusal to consider excludes applicants from the hiring process and deters exercise of the right of self-organization, the Board has emphasized that "an employer violates Section 8(a)(3) if it refuses to consider union applicants for employment *even if there are no openings at the time of the application*." *FES,* supra, at 16 (emphasis added). The same result should obtain when there are openings, but (for lawful reasons) union applicants would not be hired, even if they were considered.

That apparently was the situation here. The record indicates that the April 21 jobseekers would not have been hired, given the size of the pool of qualified referral applicants, who would have been given a legitimate preference. Moreover, had the applications of the April 21 group been accepted, the Respondent's consideration might have gone no further than determining that the jobseekers were not referral applicants. The fact remains that they were excluded from the hiring process. Accordingly, I would find a violation of Section 8(a)(3) and order the Respondent to cease and desist from failing to consider employees who fail to comply with application requirements that are intended to discriminate against employees based on their union affiliation or activities.

Debra L. Stefanik, Esq. and *Charles E. Tucker, Esq.,* for the General Counsel.

Michael E. Avakian, Esq. and *Irwin J. Brown,* of Chicago, Illinois, for the Respondent-Employer.

Brian C. Hlavin, Esq. and *Dale D. Pierson, Esq*., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on November 30 through December 4, 1998, and August 23 through 27, 1999, in Rock Island, Illinois, pursuant to a amended complaint and notice of hearing in Case 33–CA–12420 issued on November 3, 1998, a complaint and notice of hearing in Case 33–CA–12686 issued on September 22, 1998, and a complaint and notice of hearing in Case 33–CA–12942 issued on May 28, 1999 (the complaint), by the Regional Director for Region 33 of the National Labor Relations Board (the Board). The complaint, based on an original charge in Case 33–CA–12420 filed on October 9, 1997,[1] an original and amended charge in Case 33–CA–12686 filed on June 8 and August 21, 1998, and on an original and amended charge in Case 33–CA–12942 filed on March 16 and May 27, 1999,[2] by International Union of Operating Engineers, Local 150 (the Charging Party or the Union), alleges that Brandt Construction Co. (the Respondent or the Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent refused to hire and/or consider hiring 60 applicants for employment because the named applicants joined and assisted the Union, and engaged in a number of 8(a)(1) violations of the Act including threats to its employees that it would close the business rather than go union and made its hiring practices and/or procedures more difficult for employees with prounion sentiments to apply and/or be hired for a position with Respondent. Additionally, the complaint alleges that Respondent has had in effect and continues to maintain certain hiring policies and practices that give preference in hiring to referred applicants over unknown or walk-in applicants. The purpose or intended effect of the hiring policies is to make it more difficult for applicants with prounion sentiments to be considered for employment with Respondent and to discourage their membership in any labor organization.

[1] All dates are in 1997, unless otherwise indicated.

[2] The Respondent, in posthearing brief, renews its motion to dismiss the complaint in Case 33–CA–12942. In this regard, Respondent alleges that it and its attorney did not receive a copy of the amended charge from Region 33 or the Charging Party. I reaffirm my denial of the motion for the following reasons. First, the Respondent admits that it received a copy of the original charge from Region 33, and its legal representative submitted the Employer's position that was duly considered by the General Counsel before the complaint issued. The original charge alleged that both the adoption and the maintenance of the hiring policy violated Sec. 8(a)(1) and (3) of the Act. The only difference between the original and the amended charge is the removal of the 8(a)(3) allegation, and the portion of the original charge that alleged that the adoption of the hiring policy violated the Act. In all other respects, both the original and the amended charge allege the same conduct including that the maintenance of the hiring policy violated the Act. Second, although the Respondent argues that it never received a copy of the amended charge, the affidavit of service indicates that it was served with a copy of the amended charge and both the Charging Party and Attorney Hlavin stated on the record that they received the amended charge via regular mail. See *Sears, Roebuck & Co.,* 117 NLRB 522 (1957), proof of service sent by ordinary mail is "presumptive" evidence of receipt, and not rebutted by affidavit of nonreceipt). See also *CCY New Worktech, Inc.,* 329 NLRB 194 (1999). Lastly, it is noted and Respondent's attorney acknowledged on the record, that the General Counsel forwarded him a copy of the May 27, 1999 amended charge on June 11, 1999.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in business as a contractor in the construction industry, with an office and place of business located in Milan, Illinois, where it has performed services in excess of $50,000 in States other than the State of Illinois and during the past calendar year has purchased and received at its Milan, Illinois facility goods valued in excess of $50,000 directly from points outside the State of Illinois. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is primarily engaged in the building and repair of bridges and highways within a 50-mile radius of the Quad City, Illinois area. Respondent has been in existence for approximately 39 years as a nonunion employer with the exception of a short period of time in the early 1980s, when the predecessor local of the Charging Party represented its employees. At its peak, the complement of employees totals 135, 70 of which are employed in the construction division with the remaining employees assigned to its railroad division or classified as managerial and clerical employees. Respondent worked on approximately 200 new jobs in 1997, 25 of which were carry over jobs from 1996. In 1998, it worked on approximately 191 new jobs of which 25 were carried over from 1997.

At all material times Charles Brandt is the president of Respondent, Henry Brandt holds the position of vice president, Terry Brandt serves as secretary, and Todd Brandt is the treasurer. Terry and Todd Brandt are brothers, Charles Brandt is their father and Henry Brandt is Charles Brandt's brother and uncle of Terry and Todd Brandt.

B. Facts

On January 1, a sign was placed on Respondent's front office door that remained posted through April 1997 that said it was only accepting employment applications on Mondays. Around May 1, after the Monday sign was removed, another sign was posted that said Respondent is "not currently distributing or accepting employment applications." That sign has remained continuously posted up to and including the subject hearing. Exceptions to that sign include applications from current or past employees, those referred by incumbent supervisors or employees, and applications received from minority or women candidates referred by local equal employment opportunity service providers. Thus, applications from these applicants could be received on any day and even if the Respondent is not hiring. If the Respondent is not hiring but receives certain applications, it places them in files according to trade classifications such as operator, laborer, truckdriver, or flagger. Since January 1, Terry Brandt is responsible for all interviewing and hiring at Respondent having taken over those duties from Charles and Todd Brandt. In late February or early March 1997, Respondent memorialized its hiring policy and posted it on employee bulletin boards. The policy states as follows: (GC Exh. 4.)

> At Brandt Construction it is our established and continuing policy and intention to recruit, hire and promote the most competent and able employees available to serve our valued customers. We believe in providing the best equipment to achieve the best results which in turn assures us of reasonable profits and hence continued job security.
>
> We only accept employment applications on Monday. All job applications [sic] must appear in person at our office to complete an employment application. We do not consider employment applications that have been mailed nor do we ever consider employment applications which have been delivered by some one other than the applicant. The only exception we will make, is a reasonable accommodation for job applicants who cannot appear in person due to a disability pursuant to the Americans with Disabilities Act. No other exceptions will be permitted. Employment applications will be considered current for a period of two weeks only. After fourteen days the employment application expires and any individual interested in employment must complete a new application, if any are then being accepted.
>
> We will consider and perhaps eventually hire only from original employment application forms. Copies of any sort will not be considered. When received, we will specially stamp and identify original forms. The following hiring policy is rigorously followed:
>
> a. Current employees of the company;
> b. Past employees with proven safety, attendance and work records;
> c. Applicants recommended by current supervisors;
> d. Applicants recommended by current employees; and
> e. Unknown applicants
>
> We do not accept employment applications when we are not hiring. When we are hiring we only use objective criteria, such as references, work history, skills and availability to work when and where needed.[3]

[3] Terry Brandt credibly testified that the Monday hiring policy has been in effect since at least 1994, and only applies to unknown or walk-in applicants who come through the front door. It was established to control time and efficiency and to preclude those who were receiving unemployment compensation from coming into the office on any day seeking to substantiate for the Unemployment Commission that they were seeking full-time employment. Likewise, the portion of the hiring policy regarding referral of applicants (items a through e) has been rigorously followed since at least 1994. It was established as a sound business practice to assess the caliber of new employees by relying on recommendations of known supervisors and employees when seeking additional help. The portion of the hiring policy that considers employment applications to be current for a period of 2 weeks' was instituted in the February–March 1997 time period. Respondent proffered the testimony of a number of employees hired in 1997 and 1998, that it consistently followed this requirement. In this regard, those employees hired in 1997 and 1998 re-

Impacting on the above hiring policy is a conciliation agreement entered into between Respondent and the U.S. Department of Labor on March 15, wherein Respondent agreed to raise its employment of women and minorities to 6.9 and 4.6 percent, respectively, on each job in order to be in compliance with Equal Employment Opportunity (EEO) guidelines (R. Exh. 8). Thus, for each project undertaken, Respondent must hire a certain number of women and minority employees to be in compliance with Federal, State, and local EEO rules and regulations.

On April 10, at a regularly scheduled union meeting, an announcement was made that Respondent recently was awarded a large job on Interstate 74 and would probably need workers on this project. Accordingly, it was decided that a number of union members would go to Respondent's offices on April 11, to request and submit employment applications. For this purpose, the Union scheduled an early morning meeting on April 11, to instruct union members on how to fill out a blank Respondent employment application. Union members were told to wear union hats or other insignia and to be polite when seeking and filling out their employment application. All individuals were instructed to put on their employment applications that they were referred by the Union and were applying for operator, laborer, truckdriver, or flagger positions with open salary requirements.

On April 11, at various times throughout the day, the individuals listed in paragraph 6(a) of the complaint in Case 33–CA–12420 went to Respondent's offices wearing union hats and insignia to obtain and fill out employment applications. The first group of prounion applicants arrived at Respondent's office around 8:30 a.m. The individuals in this early group all credibly testified that they did not see any signs posted on the front door or inside the office that stated employment applications were only accepted on Mondays or that applications were not being currently distributed or accepted. The receptionist made enough copies of the employment application so each of the individuals present in the office received one. The individuals went outside to fill them out and then filed the applications with the receptionist.

Another group of prounion applicants arrived at Respondent's office around 9:30 a.m. on April 11. These individuals testified that they observed a sign on the front door that stated employment applications could only be turned in on Mondays. The receptionist, without asking to see photo ID, provided blank applications to the individuals in this group and informed them to turn the applications in on Monday. All of the individuals in this group also wore union hats and insignia. After completing their applications, the individuals returned on April 14 (Monday) and filed their employment applications with Respondent.

A third group of prounion applicants arrived at Respondent's office around 11 a.m. on April 11. They credibly testified that they observed a sign posted on the front door that read, applications would only be taken on Mondays between the hours of 8 a.m. and 12 p.m. When the individuals entered the reception area to request employment applications, they were met by a man who said that the Respondent was only taking applications on Monday and refused to provide them applications on that day.

On April 14, the individuals listed in paragraph 6(b) of the complaint and those that went to Respondent's office on April 11 and were given applications but were prohibited from turning them in, and those individuals in the third group who were refused employment applications, went to Respondent's office. They all wore union insignia and were permitted to obtain, fill out, and submit employment applications. The individuals in this group credibly testified that they observed a sign on Respondent's door that said applications would only be accepted on Mondays.

On April 21, the individuals listed in paragraph 6(c) of the complaint went to Respondent's office wearing union insignia to fill out and submit employment applications. On arriving at the receptionist window, they observed an 8-1/2 by 11 inch sign that said, "photo ID required." The receptionist told the individuals that Respondent would not accept an application without a photo ID and this was the policy to file an application. Several of the individuals in the group were precluded from filing an application as they did not have a photo ID in their possession on that day.

In contrast to the above facts involving the application process for individuals with prounion sentiments, walk-in applicant Debra Fowler was treated somewhat differently. On April 15 (Tuesday) Fowler went to Respondent's office around 4:15 p.m. in blue jeans, to inquire about a summer job over her school recess. Although Fowler observed a sign stating that applications were only accepted on Mondays between 8 a.m. and 12 p.m., the receptionist made an exception and provided an application to Fowler but requested that it be completed outside in her vehicle. Fowler complied and returned the application to the receptionist who she learned was named Monica.

On May 9, Fowler contacted the Respondent by telephone and spoke to Monica who informed Fowler that her application was on file but that no new applications were being accepted.

On May 23, Fowler went to Respondent's office and observed a sign that stated no applications were being currently distributed or accepted. Despite that prohibition, Monica provided an application to Fowler, let her fill it out while in the office and accepted the completed application.

On May 27, Fowler returned to Respondent's office and inquired of Monica whether Respondent was going to be hiring. While she was in the office, she observed a man filling out and then filing an application despite a sign on the office door that stated no applications were being currently distributed or accepted.

On June 6 and 27, despite a sign on Respondent's door that said no applications would be distributed or accepted, Fowler

ceived job offers within 2 weeks from the date of their applications and therefore, no employee was required to fill out a new application. The application of this rule to those hired in 1997 and 1998 is not inconsistent with the requirement that in April 1997 employees with prounion sentiments had to fill out new applications after the expiration of their previously filed applications if they sought continued employment with the Respondent. Lastly, Brandt credibly testified that the portion of the hiring policy that states, "We do not accept employment applications when we are not hiring" only applies to unknown or walk-in applicants.

was permitted to fill out and file two new applications. Starting with the June 6 visit, there was a different receptionist on duty other than Monica.

Again on July 2 and 25, despite a sign on Respondent's door that said no applications were being currently distributed or accepted, Fowler was permitted to fill out and file new applications. At no time was Fowler requested to show a photo ID in order to file the applications.

Lastly, on August 7, Fowler returned to Respondent and asked for an employment application. The receptionist told Fowler that Respondent was not giving out employment applications.

On May 6, all of the individuals who filed applications on April 11, 14, and 21 received a letter from Respondent thanking them for their recent interest in employment (GC Exh. 11). The letter, which was also received by walk-in applicants that did not have prounion sentiments, further informed the individuals that their applications would be held on file for a period of 14 days and new applications would have to be filed for further consideration. It is noted that Fowler did not receive such a letter.

On May 10 (Saturday), Respondent held a mandatory meeting at St. Ambrose Parish Center. During the course of the meeting, labor relations consultant, Irwin Brown, spoke to the assembled employees about labor relations, the pros and cons of unions and showed a 15-minute video about union organized employers.

A number of the union members who submitted applications in April 1997, returned to the Respondent in May 1997, and observed a sign that said no applications were being currently distributed or accepted. Although these individuals asked for applications, the Respondent refused to provide them. Applicant Ron Miller credibly testified that during a visit to Respondent on or about May 9, he observed a Hispanic individual filling out an application while sitting on the steps.

On May 22, 1998, a number of active and retired business agents of the Charging Party assembled at the union hall. A video was taken and shows them wearing union hats, buttons, and jackets. After the video, the group departed for the Respondent's offices with the intention of obtaining and completing applications for employment. On arriving at Respondent's offices and approaching the front door, a sign was visible that stated, "We are not currently distributing or accepting employment applications." After entering Respondent's offices, and turning on the video camera, the union spokesperson told the receptionist that the men heard that they were hiring and requested an interview for the purpose of seeking work. Terry Brandt appeared and asked the individuals to leave the office or he would be forced to call the police as they were on private property. Thereafter, Irwin Brown appeared and apprised the individuals that the Respondent was not hiring or giving interviews and apparently they were misinformed. Brown pointed to a sign and told the employees that the Respondent only accepts applications on Mondays when it is hiring. All the individuals left the premises when it became clear that they would not be given applications or granted an interview.

There is no dispute that the Respondent hired 29 employees between April and December 31 (GC Exh. 7) and 26 individuals in 1998 (GC Exh. 8). Of the 29 employees hired in 1997, 28 were referral candidates nominated by incumbent supervisors and employees or EEO service providers and the other hire was Angela L. Smith, a prounion applicant listed in paragraph 6(c) of the complaint.[4] Although Smith was hired, she only stayed a short time before resigning to obtain a higher paying job. The employees hired in 1998 were all referral applicants and did not include any of the individuals listed in paragraph 6 of the complaint in Case 33–CA–12686.

C. Discussion and Conclusions

1. The 8(a)(1) allegations

The General Counsel alleges in paragraph 5(a) of the complaint in Case 33–CA–12420 that since April 11, Respondent has changed, limited and made more onerous its hiring practices and/or procedures with a purpose of making it more difficult for employees with prounion sentiments to apply and/or be hired.

The evidence presented during the course of the hearing supports this allegation. In this regard, I credit the testimony of Brian Struck, who stated that during the May 10 all employee meeting, Terry Brandt said, "Brandt Construction Company was no longer accepting applications over the counter because they knew that Local 150 was trying to salt their work force." This is also consistent with the similar testimony of Robert Hadselford who stated that Terry Brandt said at the May 10 meeting, "[T]hat because of the overwhelming number of applications received from the Union, it was necessary to accept applications on certain days between 8 a.m. and 12 noon." The chronology of events as discussed above also supports this conclusion. For example, on April 11 between 8:30 and 9:30 a.m., no sign was posted that limited the acceptance of applications to Mondays and prounion applicants were given applications and permitted to file them with Respondent. On that same day around 9:30 a.m., despite the presence of a sign that stated applications could only be filed on Mondays (that presumably was posted after the first prounion individuals filed their applications), the prounion individuals were given employment applications but were not permitted to file them. A third group of pro-union applicants, who arrived at the Respondent between 10:30 a.m. and 12 noon, were refused applications and told to return on April 14 (Monday), to file their applications. Lastly, on April 21 (Monday), a new requirement was imposed on prounion applicants in that it was necessary to show a photo ID before a completed application would be accepted. Respondent payroll clerk Lisa Coyne and receptionist Melinda Morrow both credibly testified that the requirement to show a photo ID before a completed application would be accepted was not in effect before April 21.

All of the above progressive and more onerous hiring procedures are in sharp contrast to the treatment received by walk-in and unknown applicant Debra Fowler. In this regard, Fowler was given an application on April 15 (Tuesday), and permitted to file it with Respondent. On May 23, despite a sign posted on the door that said applications were not being currently distrib-

[4] Smith was hired in May 1997, in part, because she attended a flagger course sponsored by Respondent in April 1997.

uted or accepted, Fowler was given an employment application and filed it with Respondent. On May 27, despite a sign posted on the door that said applications were not being currently distributed or accepted, Fowler observed an individual filling out an application in the office. In addition, Fowler was permitted to file new applications on June 6 and 27, July 2 and 25, despite a sign posted on the door on each of those days that said applications were not being currently distributed or accepted. Additionally, the Respondent's own records confirm that on a number of occasions between January and April 1997, applications were accepted from walk-in applicants on days other than Mondays (GC Exh. 9, CP Exh. 14). Moreover, at no time was Fowler required to show a photo ID before filing any of her applications with Respondent.

Based on the forgoing, I find that Respondent changed and made more onerous its hiring procedures for individuals with prounion sentiments in comparison to employees that did not exhibit such sentiments for the sole purpose of making it more difficult for prounion employees to apply for positions. Therefore, I conclude that Respondent violated Section 8 (a)(1) of the Act as alleged by the General Counsel in paragraph 5(a) of the complaint.

The General Counsel also alleges in paragraph 5(b) of the same complaint that Terry Brandt threatened its employees that it would close the business rather than go union during the May 10 meeting, held at the St. Ambrose Parish Center.

In order to sustain this allegation, the General Counsel principally relies on the testimony and pre-trial affidavit of Brian Struck (R. Exh. 10). Struck testified that he first prepared a handwritten statement that he gave to the Union. The Union forwarded the handwritten statement to its lawyers who typed the affidavit and when it was returned to the union office for Struck's signature it contained in quotes at paragraph 5 that Terry Brandt said he would close his doors before he would ever go union again. During cross-examination by Respondent's counsel and questions that I asked Struck, it became apparent that the portion of the affidavit concerning the Brandt statement was Struck's interpretation of what Brandt said, rather than a direct statement that Brandt made during the course of the all employees' meetings. Additionally, employees Monica Verbeke, Joseph Copeland, Mike Taylor, Tom Rockwell, and Kelly Bisby all credibly testified that Terry Brandt did not make a statement at the May 10 meeting that he would close his doors before he would ever go union again. Under these circumstances, and in the absence of any other evidence presented by the General Counsel to sustain this allegation, I find that Terry Brandt did not make the statement as alleged in the complaint. Accordingly, I recommend that paragraph 5(b) of the complaint be dismissed.

The General Counsel also alleges in paragraph 5 of the complaint in Case 33–CA–12686 that around June 8, 1998, Respondent's foreman, Joe Copeland, told its employees that a sign on the door stating that Respondent was not accepting applications had been put up to prevent employees with prounion sentiments from applying for work and being hired.

On June 8, 1998, Chuck Stevens telephoned his old Foreman Joe Copeland to inquire whether he could be rehired at Respondent. According to Stevens, Copeland said that, "Local 150 guys have caused trouble and there is a sign on the door that we are not taking applications." "I can't get you in the front door but probably could get you in the back door." Copeland told Stevens that he would check with Charles Brandt about whether he could be hired. Several days went by and Stevens called Copeland who told him he did not talk to Brandt as of yet but promised to do so. On or about June 19, 1998, Stevens spoke to Copeland who told him that Brandt said he could be hired. Copeland told Stevens to report to work on June 22, 1998, wearing work clothes. Stevens reported to work but since Terry Brandt was not in as of yet, he was told by Charles Brandt to proceed to the Interstate 74 project. Stevens worked the entire day and was told by Copeland at the end of the day to report to the office the next day to fill out an employment application. Stevens reported to the office on June 23, 1998, and completed an employment application backdating it to June 22, 1998, to coincide with his first day of work (GC Exh. 8(n)).

Copeland testified and admitted that he had a number of telephone conversations with Stevens that eventually led to his hire on June 22, 1998. Copeland denies that in any of the telephone conversations that he had with Stevens that he ever discussed the Union and never told Stevens that there was a sign on the door that said the Respondent was not currently distributing or accepting applications.

Copeland did admit that Stevens was hired on June 22, 1998, despite a sign on the door that Respondent was not currently distributing or accepting applications. Based on my evaluation of the testimony, I conclude that Copeland made the statement attributed to him in the complaint. In this regard, it is inconceivable to me that Copeland did not mention to Stevens during their telephone conversations that the Union had been causing trouble and therefore, there was a sign on the door that Respondent was not currently distributing or accepting applications. Indeed, Copeland admitted that despite the sign on the door, Stevens was hired. Moreover, Stevens' testimony is entirely consistent with his pretrial affidavit executed on July 25, 1998, a period of time close to the events in question. Lastly, Stevens impressed me as a credible witness whose testimony had a ring of truth to it.

Under these circumstances, I find that Copeland made the statement attributed to him in paragraph 5 of the complaint in Case 33–CA–12686. Accordingly, such a statement tends to interfere with the rights of employees guaranteed in Section 7 of the Act and is violative of Section 8(a)(1) of the Act.

2. The 8(a)(1) and (3) allegations and the hiring policy

The General Counsel alleges in paragraphs 6(a), (b), and (c) of the complaint in Case 33–CA–12420 that since on or about April 11, 14, and 21, the Respondent refused to hire and/or consider hiring certain applicants for employment. Additionally, in paragraph 6 of the complaint in Case 33–CA–12686, the General Counsel alleges that since about May 22, 1998, Respondent has refused to consider hiring certain applicants for employment. Lastly, the General Counsel alleges in paragraphs 5(a) and (b) of the complaint in Case 33–CA–12942, that since at least September 16, 1998, the Respondent has had in effect and continues to maintain certain hiring policies and practices

that give preference in hiring to referred applicants over walk-in or unknown applicants with a purpose or intended effect of making it more difficult for applicants with prounion sentiments to be considered for employment with Respondent and to discourage their membership in any labor organization, in violation of Section 8(a)(1) of the Act.

Respondent acknowledges that the majority of the individuals listed in the complaint were not hired for positions at Respondent but asserts that they were rejected because of their status as unknown or walk-in applicants. In this regard, all hiring in 1997 and 1998 was undertaken in accordance with its hiring policy that has been in effect since at least 1994, and was memorialized and posted on employee bulletin boards in late February or early March 1997 (GC Exh. 4). That policy gives higher priority to current and past employees of Respondent and applicants recommended by current supervisors and employees before considering unknown or walk-in applicants. Thus, in 1997 and 1998, the majority of hires for laborer, truckdriver, and flagger positions were filled from a ready pool of referral applicants in accordance with the established hiring policy. Additionally, Respondent argues that it was required to hire a certain number of women and minority applicants for each job undertaken, pursuant to the conciliation agreement entered into between it and the U.S. Department of Labor on March 15 (R. Exh. 8).

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision. *Manno Electric,* 321 NLRB 278 fn. 12 (1996). In a refusal to hire case, the General Counsel specifically must establish that each alleged discriminatee submitted an employment application, was refused employment, was a union member or supporter, was known or suspected to be a union supporter by the employer, who harbored antiunion animus, and who refused to hire the alleged discriminatee because of that animus. *Big E's Foodland,* 242 NLRB 963, 968 (1979). Inferences of animus may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once that is accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity. *T & J Trucking Co.,* 316 NLRB 771 (1985).

There is no dispute that all of the prounion applicants listed in paragraphs 6(a), (b), and (c) of the complaint in Case 33–CA–12420 submitted or attempted to submit applications to Respondent, that all were union members or supporters, and that with the exception of Angela L. Smith none were hired. Likewise, it cannot be argued that the Respondent did not know that the above noted applicants were union members or supporters. In this regard, the majority of the listed applicants went in groups to file their applications, wore union hats, and insignia and included in their applications that they were union members. Additionally, on April 11, union spokesperson Mark McCaffrey introduced himself to the receptionist as a representative of the Charging Party.

With respect to union animus, I conclude as found above that the Respondent has changed and made more onerous its hiring procedures with a purpose of making it more difficult for employees with prounion sentiments to apply for positions. This is further buttressed by the remarks made by Terry Brandt at the May 10 all employee meeting that the Union was attempting to "salt the workforce," and were not denied by Brandt during his extensive testimony throughout the proceeding.

The critical portion of the analytical framework is whether the Respondent refused to hire and/or consider hiring the applicants who applied for positions in 1997 and 1998, and are listed in paragraphs 6(a), (b), and (c) of the complaint in Case 33–CA–12420 and paragraph 6(a) of the complaint in Case 33–CA–12686.

After careful consideration, I conclude that the Respondent did not refuse to hire and/or consider hiring the 1997 and 1998 applicants because of their prounion sentiments. Rather, I find that the Respondent faithfully adhered to its longstanding hiring policy that has been in effect since at least 1994, and was posted on employee bulletin boards prior to the submission of the prounion applications in April 1997. Additionally, I find that the March 15 conciliation agreement, entered into by Respondent and the U.S. Department of Labor to remedy underrepresentation of women and minority employees in the Respondent's workforce, mandated hiring these individuals. I note, however, that while the Springfield Urban League and the Illinois Operating Engineers Training Coordinator referred five minority nonunion applicants to Respondent in April 1997, two of the five were not hired. Likewise, the Respondent did not hire Deborah Fowler, despite providing her relaxed opportunities to obtain and file numerous employment applications on days other than Mondays. Thus, I find that the Respondent also did not hire minority referral agency or walk-in applicants in the same manner that it did not hire applicants with prounion sentiments. Moreover, I find that the Respondent did consider the application of prounion applicant Angela L. Smith and hired her as a flagger in May 1997.

Lastly, in reviewing the applications of the individuals hired in 1997 and 1998 to the exclusion of the prounion applicants (GC Exhs. 7 and 8), I note that all of the positions filled were for laborer, truckdriver, or flagger positions paying between $8 and $10 per hour. The majority of the prounion applicants (34 of 60) were higher paid skilled operators and the documents in evidence establish that an abundant pool of lower paying referral applicants existed for laborer positions. In accordance with its hiring policy, the Respondent hired the referral applicants as they receive higher priority than unknown or walk-in applicants. Thus, it legitimately rejected the applications of the prounion operators and laborers based on its hiring policy. This result is not unlike the Board's holding in *Custom Topsoil, Inc.,* 328 NLRB 446 (1999). In that case the Board found that the Act was not violated when the respondent differentiated between "stranger" applicants and familiar applicants but not between union and nonunion applicants. Likewise, the Board found in the case of *Zurn/N.E.P.C.O.,* 329 NLRB 484 (1999), that the employer's longstanding hiring policy that gives pref-

erence to former employees and to employees referred by the respondent's current managers, supervisors, and employees does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds. Compare *Richard Mellow Electrical Contractors Corp.,* 327 NLRB 1112 (1999), wherein the Board held that the record failed to substantiate that the Respondent had any general policy giving preference to referrals and individuals who had previously indicated an interest in employment.

In regard to the pro-union applicants listed in paragraph 6 of the complaint in Case 33–CA–12686, who were not permitted to submit applications on May 22, 1998, I conclude that the Respondent possessed an available pool of referral applicants to fill the 26 laborer positions that they hired in 1998.[5] Thus, in accordance with its nondiscriminatory hiring policy, an abundant number of qualified candidates for the laborer positions were on file. I further note that all of the prounion applicants listed in paragraph 6 of the complaint were higher paid skilled operators, and that Respondent hired only two operators in 1998. *Bay Control Services,* 315 NLRB 30 fn. 2 (1994) (General Counsel must "show that there were jobs available for new hires on those dates . . . and establish [the employer] needed employees on the specific days that the union members sought work"). I also conclude that unknown or walk-in candidates that did not possess prounion sentiments were treated similarly to applicants with prounion sentiments, and did not receive applications in May 1998 under Respondent's nondiscriminatory hiring policy. Lastly, I note that the individuals with prounion sentiments attempted to file their applications on May 22, 1998, a day that the Union observed a sign on the door that said the Respondent was not currently distributing or accepting applications or hiring employees.

Based on the forgoing, I recommend that the 8(a)(1) and (3) allegations alleged in the complaint for Cases 33–CA–12420 and 33–CA–12686 be dismissed. Likewise, and principally relying on the Board's recent pronouncement in *Zurn N.E.P.C.O.,* supra*,* I recommend that the 8(a)(1) allegations in the complaint for Case 33–CA–12942 also be dismissed. In this regard, I find that the Respondent did not continue to maintain hiring practices that give preference in hiring to referral applicants over walk-in or unknown applicants with the purpose or intended effect of making it more difficult for applicants with prounion sentiments to be considered for employment.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By changing its hiring practices to restrict the receipt of job applications, Respondent violated Section 8(a)(1) of the Act.

4. By telling employees that a sign on the Employer's door stating that it was not accepting applications had been put up to prevent employees with prounion sentiments from applying for work and being hired for a position with Respondent, the Employer violated Section 8(a)(1) of the Act.

5. Respondent's hiring policy is not inherently discriminatory so as to make it more difficult for applicants with prounion sentiments to be considered for employment or to discourage their membership in any labor organization.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Brandt Construction Co., Milan, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing its hiring practices to restrict the receipt of job applications from employees with prounion sentiments.

(b) Telling employees that a sign on the Employer's door stating that it was not accepting applications had been put up to prevent employees with prounion sentiments from applying for work and being hired for a position with Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Milan, Illinois, copies of the attached notice marked

[5] The General Counsel argues that the Respondent did not adhere to its hiring policy when it hired and permitted employees Marty Clark and Chuck Stevens to file employment applications. I find that the facts dictate otherwise. It is not disputed that Clark was permitted to file an employment application on May 22, 1998 (GC Exh. 18). Immediately on realizing that Clark was not referred in accordance with Respondent's hiring policy, and was a unknown or walk-in applicant (Clark was referred by his step-father, a business acquaintance of Terry Brandt), Brandt wrote Clark a letter dated May 22, 1998, rejecting his application (GC Exh. 19). With respect to the General Counsel's assertion that Clark was hired on May 22, 1998, his pretrial affidavit refutes this contention. In this regard, Clark stated that, "I got the impression from my interview with Todd Brandt that he was going to give me a job so I put in a 2-week notice where I worked, and I hoped he would find something." Both Todd and Terry Brandt credibly testified that they did not offer Clark a job on May 22, 1998. Indeed, Clark was never hired at Respondent. Moreover, Clark's credibility is further cast in doubt as a result of Clark's October 7, 1998 employment application to McCubin Construction that conflicts with the May 22, 1998 employment application filed with Respondent (compare GC Exh. 18 with R. Exh. 16 that lists different prior employers). With respect to Stevens, the record demonstrates that as a former employee of Respondent his application could be received even at a time that applications were not being currently distributed or accepted. Moreover, Stevens was recommended for employment by a current supervisor in accordance with Respondent's hiring policy and is not classified as a unknown or walk-in candidate.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

"Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(c) IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT change or make more onerous our hiring practices with a purpose of making it more difficult for employees with prounion sentiments to apply for a position.

WE WILL NOT tell employees that a sign on our door stating that we were not accepting applications had been put up to prevent employees with prounion sentiments from applying for work or being hired.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BRANDT CONSTRUCTION CO.